JAMES A. DIBOISE, State Bar No. 83296
(jdiboise@wsgr.com)
DAVID S. KRAMER, State Bar No. 168452
(dkramer@wsgr.com)
COLLEEN BAL, State Bar No. 167637
(cbal@wsgr.com)
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 565-5100

Attorneys for Plaintiff
GOOGLE INC.

G. HOPKINS GUY, III (State Bar No. 124811)
(hopguy@orrick.com)
ERIC L. WESENBERG (State Bar No. 139696)
(ewesenberg@orrick.com)
RORY G. BENS (State Bar No. 201674)
(rbens@orrick.com)
GABRIEL M. RAMSEY (State Bar No. 209218)
(gramsey@orrick.com)
PETER J. O'ROURKE (State Bar No. 221764)
(porourke@orrick.com)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
Telephone: (650) 614-7400
Facsimile: (650) 614-7401

Attorneys for Defendant
AFFINITY ENGINES, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GOOGLE INC., a Delaware corporation,

Plaintiff,

v.

AFFINITY ENGINES, INC., a Delaware corporation,

Defendant.

CASE NO.: C 05-00598 JW (HRL)

JOINT CASE MANAGEMENT STATEMENT/RULE 26(f) REPORT

Date: June 20, 2005
Time: 10:00 a.m.
Judge: The Honorable James Ware
Courtroom 8

The parties, Plaintiff Google Inc. ("Google") and Defendant Affinity Engines, Inc. ("AEI") jointly submit this Case Management Statement/Rule 26(f) Report.

DESCRIPTION OF THE CASE

1. A brief description of the events underlying the action:

Google's complaint generally alleges in Count I that Affinity Engines, Inc. ("AEI") infringes Google's copyright in inCircle software code written by Google employee Orkut Buyukkokten ("Buyukkokten"). The inCircle code implements an online "social networking" service. A social networking service contains personalized information about users, and allows the users to communicate with other participants in the online community. A dispute exists as to the ownership of the asserted copyright and the underlying ownership of the inCircle code and software as asserted in Count I of Google's complaint. The software implementing the first version of Orkut.com was written by Buyukkokten during his employment at Google. Google alleges that it owns the rights to this software based on an employment and inventions assignment agreement ("August 5, 2002 Assignment Agreement") that Buyukkokten executed as a condition of his Google employment and based on the work-for-hire doctrine of copyright law. Google alleges that AEI has infringed Google's copyright by reproducing, distributing and creating derivative works of inCircle.

Buyukkokten co-founded defendant AEI, a company that commercialized social networking software based on the inCircle code. Following the launch of Orkut.com, AEI filed a lawsuit in state court on May 25, 2004, alleging that AEI owns the inCircle code and that the Orkut.com code was copied, developed, or derived from AEI's inCircle code by Google and Buyukkokten. Based on the alleged copying, development, or derivation, AEI has alleged a claim for trade secret misappropriation, among other torts. Google asserts by way of its affirmative defenses that pursuant to the August 5, 2002 Assignment Agreement, Google owns or has a license to the disputed code.

After a failed mediation, Google registered its copyright in the inCircle program, and filed this action for copyright infringement against AEI. Google alleges in this lawsuit that defendant AEI has infringed, and continues to infringe, the copyright in inCircle by reproducing, distributing and creating derivative works of inCircle, in the form of various social networking services it has deployed for alumni associations. Google seeks copyright remedies for such infringement. Google also seeks a declaration that (1) it owns the copyright to inCircle, and (2) defendant AEI's purported copyright registration for inCircle is invalid.

2. The principal factual and legal issues in dispute:

- Ownership of the copyright to inCircle program
- Ownership of the inCircle code
- Effect of various assignments executed by Buyukkokten under copyright law
- Whether AEI's use of the inCircle program infringes Google's copyright to the inCircle program
- The damages to which Google is entitled under copyright law upon a showing of infringement

3. Other factual issues *[e.g. service of process, personal jurisdiction, subject matter jurisdiction or venue]* which remain unresolved for the reason stated below and how the parties propose to resolve those issues:

AEI's Motion to Stay

Google's Position:

AEI has filed a motion to stay Google's copyright infringement action in favor of AEI's trade secret case filed in state court. Google contends that AEI's motion should be denied because federal courts have exclusive jurisdiction to hear the copyright issues raised in this case, and because controlling Ninth Circuit authority prohibits a district court from staying an action with exclusive federal jurisdiction in favor of a state court proceeding. Moreover, contrary to AEI's assertions, purported duplication of efforts is irrelevant to the current stay motion under Ninth Circuit authority, and in any event, there will be no duplication of efforts because the state court case is still in the early stages of litigation. Judge Elfving just dismissed six out of seven of AEI's state court claims with twenty days' leave to amend. Thus, the state court case will likely remain in the pleadings stage for the foreseeable future. No trial date is set in that action.

Discovery is still in the early stages -- only one deposition has been taken and the parties are still engaged in written discovery and the production of documents. Further, as discussed below, to a large extent, any discovery taken in the state court case can be used as discovery in this case with only minor additional discovery needed in this case.

AEI's Position:

The instant case should not proceed because the state court litigation is nearing completion and will resolve all issues surrounding ownership of the inCircle source code, the central, threshold issue in both the state and federal cases. Google's declaratory judgment complaint in the present federal action and Google's affirmative defenses in the state court action present the same common question of whether Google can challenge AEI's ownership of the inCircle software under state law. The trial setting conference for the state case is scheduled for July 26, 2005. In the last trial setting conference, the judge continued the trial setting conference to July 26 but cautioned that trial could occur in the fall of 2005. Moreover, fact discovery is nearing completion, as six depositions are already scheduled for the next six weeks, and document productions by the parties are substantially complete. AEI is waiting for Google to provide dates no later than August 5th for the deposition of its corporate designee and for the depositions of Google co-founders Larry Page and Sergey Brin, which the superior court recently compelled. The deposition of Orkut Buyukkokten, the alleged author of the code, will be conducted on June 22 and 23. Google has already deposed AEI's corporate designee on the issue of ownership.

4. The parties which have not been served and the reasons:

None at this time.

5. The additional parties which the below-specified parties intend to join and the intended time frame for such joinder:

None at this time.

6. The following parties consent to assignment of this case to a United States Magistrate Judge for trial:

This action was originally assigned to United States Magistrate Judge Bernard Zimmerman. On February 10, 2005, Google filed a request for reassignment, stating that it declines to consent to the assignment of this case to a United States Magistrate Judge for trial and disposition and requesting that the action be reassigned to a United States District Judge. Thereafter, this action was reassigned to the Honorable James Ware, United States District Judge.

ALTERNATIVE DISPUTE RESOLUTION

7. The parties filed separate ADR Statements. Google agrees to ENE and mediation. AEI agrees to participate in mediation on the condition that the parties seek resolution of all issues in both the state and federal cases. The ADR unit ordered that the parties participate in a telephone conference regarding ADR procedures. That conference call is scheduled for June 13, 2005 at 9:30 a.m.

DISCLOSURES

8. The parties certify that they have made the following disclosures:

The parties have agreed to exchange Initial Disclosures as required by Fed. R. Civ. P. 26(a)(1) on June 15, 2005.

DISCOVERY

9. The parties agree to the following discovery plan:

Google's Position:

AEI has stated that because it believes this case should be stayed in favor of the state court case, it is inappropriate to develop a discovery plan at this time. Thus, there has been no agreement reached on setting any discovery limits or a schedule. Google believes that, generally speaking, the documents produced in the state court action will be sufficient for the purposes of document production in this case except that there will be discrete categories of discovery that relate to Google's copyright infringement claim that need to be conducted in this case. AEI has refused to provide discovery relating to copyright issues in the state case.

Google proposes that the following discovery schedule apply:

Deadline for completing any written discovery: 5 months

Deadline for completing deposition discovery: 5 months

AEI's Position:

AEI believes that discussion of discovery between the parties in this case or any deadlines associated with same is premature in view of the pending motion to stay before the Court. In any case, much of the discovery relevant to this case has already occurred or will occur in the state case within the next two months.

TRIAL SCHEDULE

Google's Position:

10. Google requests a trial date of March/April 2006

11. Google expects that the trial will last for the following number of days: 7 days

AEI's Position:

AEI believes that no trial date should be set at this time in view of the pending motion to stay before the Court and the lack of any prejudice to Google in view of the ample discovery currently occurring in the state case.

Dated: June 10, 2005

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/
David H. Kramer

Attorneys for Plaintiff
GOOGLE INC.

Dated: June 10, 2005

ORRICK HERRINGTON & SUTCLIFFE LLP

By: /s/
G. Hopkins Guy, III

Attorneys for Defendant
AFFINITY ENGINES, INC.

CERTIFICATION

I, David H. Kramer, am the ECF User whose identification and password are being used to file the Joint Case Management Statement/Rule 26(f) Report and Proposed Order. In compliance with General Order 45.X.B, I hereby attest that all parties have concurred in this filing.

DATED: June 10, 2005

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ David H. Kramer
David H. Kramer

Attorneys for Plaintiff
GOOGLE INC.